APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8171

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants,*

THE NEW YORK CENTRAL RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, ILLINOIS TERMINAL RAILROAD COMPANY, AND WABASH RAILROAD COMPANY, *Intervening Defendants.*

Donald Macleay (Macleay and Lynch), of Washington, D.C.; for Plaintiffs Dixie Carriers, Inc., and Coyle Lines Incorporated.

Richard J. Hardy and Nuel D. Belnap (Belnap and McAuliffe), of Chicago, Illinois; for Plaintiffs American Barge Line Company and Federal Barge Lines, Inc.

E. V. Greenwood (Fulbright, Crooker, Freeman, Bates & Jaworski) of Houston, Texas; for all Plaintiffs.

Stanley N. Barnes, Asst. Atty. Gen., of Washington, D.C. and Malcolm R. Wilkey, U.S. Atty., of Houston, Texas, and Edward M. Reidy, Chief Counsel, of Washington, D.C., and Samuel R. Howell, Asst. Chief Counsel and Leo H. Pou, of Washington, D.C.; for Defendants the United

States of America and the Interstate Commerce Commission.

John A. Daily, of Chicago, Illinois, and Palmer Hutcheson, Jr. (Hutcheson, Taliaferro & Hutcheson) of Houston, Texas; for Intervenors, New York Central Railroad Company, Chicago and Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company.

E. V. Greenwood (Fulbright, Crooker, Freeman, Bates and Jaworski) of Houston Texas, and John H. Eisenhart, Jr., of Washington, D.C.; for Intervening Plaintiff American Waterways Operators, Inc.

December 31, 1954

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

KENNERLY, District Judge:

This is a suit by Plaintiffs, Dixie Carriers, Inc., Coyle Lines Incorporated, American Barge Line Company and Federal Barge Lines, Inc., against the Interstate Commerce Commission (for brevity called Commission) and the United States of America, Defendants. The New York Central Railroad Company, the Chicago and Eastern Illinois Railroad Company, the Illinois Terminal Railroad Company and the Wabash Railroad Company have intervened on the side of Defendants and are referred to as Intervening Defendants. The American Waterways Operators, Inc., have also intervened on the side of Plaintiffs and are referred to as Intervening Plaintiffs. The trial was before a three-judge court convened under Sections 2284 and 2325 of Title 28, U.S.C.A.

Plaintiffs moving under the Interstate Commerce Act, as amended by the Transportation Act of 1940 respecting

water carriers (49 U.S.C.A., Secs. 901 et seq.) complain of and seek to enjoin, set aside and annul an order of the Commission with respect to rail rates, barge rates and rail-barge rates on sulphur mines in Texas and approximately 60 miles from Galveston, Texas, but described as being in the Galveston area, through East St. Louis, Illinois, to Danville, Illinois. Specifically, Plaintiff sought in their application before the Commission to have established a through barge-rail route and a joint through barge-rail rate for sulphur from Galveston, Texas, to Danville, Illinois, via East St. Louis, i.e. by barge from Galveston to East St. Louis, and by rail from East St. Louis to Danville. Plaintiffs claimed that the establishment of such route and rate was necessary and desirable in the public interest and that the failure and refusal to establish same discriminated against them as connecting carriers. The order complained of which denied Plaintiffs' application to the Commission was entered in a proceeding before the Commission entitled American Barge Line Company, et al., v. Chicago & Eastern Railroad Company, et al. (I.C.C. Docket No. 30731, reported in 287 I.C.C. 403 and 291 I.C.C. 422.)

Among the several persons who were parties to, intervened in or took part in the hearings before the Commission there were no shippers nor consumers of sulphur. There was one intervenor, the American Waterways Operators, Inc., who appeared on behalf of the "inland water carriers generally throughout the United States", and the Galveston Chamber of Commerce intervened, was represented at the hearings, but did not otherwise participate in the proceedings. But no one purported to participate in the proceedings on behalf of or in the interest of the public generally.

The facts are not greatly if at all in dispute, and are fully shown by the Record. They may be briefly summarized substantially as follows:

proviso of § 305(e) of the Act. 54 Stat. 935, 49 U.S.C. § 905(e)."

We believe the Mechling case is not controlling here.

From what has been said it follows that judgment should be and is entered here for Defendants. Let appropriate decree be drawn and presented.

APPENDIX B

No. 30731

INTERSTATE COMMERCE COMMISSION

AMERICAN BARGE LINE COMPANY ET AL. v. CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY ET AL.

Submitted November 4, 1953. Decided January 19, 1954

On reconsideration, combination barge-rail rate on sulphur from Galveston, Tex., to Danville, Ill., found not shown to be unreasonable; establishment of a joint barge-rail rate on the same traffic found not shown to be necessary or desirable in the public interest; and allegation of discrimination under section 3(4) of the act not sustained. Prior findings, 287 I. C. C. 403, affirmed.

Appearances as shown in prior report and, in addition, *John H. Eisenhart* for an intervener supporting complainants; and *John A. Daily* for defendants.

Report of the Commission on Reconsideration

BY THE COMMISSION:

In the prior report herein 287 I. C. C. 403, decided December 22, 1952, division 3 found that the combination rate on sulphur by barge from Galveston, Tex., to East St. Louis, Ill., and thence by rail to Danville, Ill., was not shown to be unreasonable for the service offered thereunder, that the establishment of a joint differential barge-rail rate as sought was not shown to be necessary or desirable in the public interest, and that the allegation of discrimination against the complaining barge lines under section 3(4) of the Interstate Commerce Act had not been sustained. Upon complainants' petition and replies by defendants, the proceeding was reopened for reconsideration upon argument, which we have heard. The

differences were prescribed, but the prescriptions were based upon a presentation of adequate evidence, which is not the case here.

The circumstances here, insofar as the establishment of a joint barge-rail rate is concerned, are in all respects similar to those in *Algonquin-Missouri Chemical Corp.* v. *A., T. & S. F. Ry. Co.*, 286 I. C. C. 307, wherein division 3 found that the establishment of a joint rate and through route as there sought on sulphur from Port Sulphur, La., to De Soto, Kans., was not shown to be necessary or desirable in the public interest. The complainants there were the Inland Waterways Corporation, operating the Federal Barge Lines, and shipper or receiver located at De Soto. Here, no shipper has evidenced an interest in the rate sought, and the rate over the all-rail route which it is intended to meet is on a depressed basis. In these circumstances, we cannot find that the public interest requires the establishment of the joint barge-rail rate sought.

At the oral argument counsel for complainants agreed that one way the alleged discrimination could be removed would be by the use of $2.26 as a proportional rate for the services of the defendants operating from East St. Louis to Danville, which is the amount received by them as a division of the joint barge-rail rate of $6.66 from Port Sulphur to Danville. He stated, however, that he did not believe that that was one of the issues of their complaint. This belief appears to be correct. The complaint in this respect is directed against the alleged discrimination in favor of rail lines serving Galveston and not Port Sulphur, and what the rail lines receive as their share of the rate from Port Sulphur is not helpful here. The amount received by the East St. Louis-Danville lines in the division of the all-rail rate from Galveston is not shown, but even if it were shown, we do not think a finding of unlawful discrimination under section 3(4) could be supported on the facts presented. The claim here is, not that the com-

plainants are discriminated against in the matter of divisions of joint rates, as was the case in *Western Pac. R. Co.* v. *Southern Pac. Co.*; 55 I. C. C. 71, referred to by the complainants, nor that the separately established rate paid by the shipper as one of the components of a combination rate is greater for the transportation of ex-barge traffic than for ex-rail traffic, which was the situation in *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, also cited by the complainants, but that the separately established rate paid by the shipper on ex-barge traffic beyond East St. Louis is greater than the unpublished division of a joint through all-rail rate received by the rail carriers for the transportation beyond East St. Louis on ex-rail traffic moving from the same origin to the same destination. The comparison is between a rate or charge paid by a shipper and a division of a joint rate received by rail carriers, and is of unlike things. Basically, divisions of joint rates are the result of contractual arrangements between carriers; they are not "rates" or "charges" as those terms are used in section 3(4) of the act. A seemingly contrary opinion expressed in *Western Pac. R. Co.* v. *Southern Pac. Co.*, *supra*, upon which the complainants rely, was made, as above indicated, under circumstances different from those now before us, and is not controlling here.

The rail rate of $2.95 from East St. Louis to Danville, used as a component of the through combination barge-rail rate on complainants' traffic from Galveston to Danville, is also used for similar application on sulphur carried from Galveston to East St. Louis by contract carriers by barge. It will also apply on sulphur moved to East St. Louis by rail carriers not parties to joint rates. The depressed character of this rate, originally established under intermediate application under the fourth section when the rail lines reduced their rate from East St. Louis to Joliet, Ill., to meet barge competition, is shown by its comparison with noncompetitive rail rates of from

$4.70 to $5.82 for lesser hauls in the same general area. A proposal of defendants to further reduce the application of the same rate on traffic to Joliet, in an effort to meet further competition of the barge lines, was suspended upon protest of the barge lines, and was found not shown to be just and reasonable by division 2 in *Crude Sulphur from East St. Louis to Joliet, Ill.*, 270 I. C. C. 231. Had that rate been permitted to become effective the rate from East St. Louis to Danville would now be approximately the same as the rail division of the Port Sulphur-Danville joint rate, but such a rate would then have been available to the traffic of all carriers not parties to joint rates, including traffic moved into East St. Louis by contract carriers by barge. Complainants show that their fully distributed cost for hauling sulphur by water for 1,500 miles, the approximate water distance from Galveston to East St. Louis, is $4.03 per gross ton. Their witness estimated that it costs the barge lines about 29 cents to deliver the traffic to the rail lines at East St. Louis, which would make the total cost $4.32 per gross ton for moving sulphur by barge from Galveston to East St. Louis and delivering it to defendants at that point for movement to Danville. This may be contrasted with complainants' rate of $5.32, for local delivery, and $5.41, as a component of their proposed joint rate, to East St. Louis from Galveston, and suggests the observation that if any reduction in the barge-rail charge from Galveston to Danville is needed it ought to come out of the barge factor and not out of the depressed rail factor.

Upon reconsideration, we find that the findings in the prior report should be, and they are, affirmed.

KNUDSON, *Commissioner*, dissenting:

I am in disagreement with the conclusion reached on the issue under section 3(4) of the act. The complaining barge lines are willing to absorb the charge for the transfer of the sulphur from the barge to the rails at East St. Louis,

and there is here no serious contention that in other respects the circumstances affecting the transportation from East St. Louis to Danville are any different for the ex-barge than for the ex-rail traffic. It is true that the record fails to show the division of the joint all-rail rate received by the East St. Louis-Danville defendants, but it is evident that the division is less than the local rate from East St. Louis to Danville, which local rate must be paid by the shipper on this ex-barge traffic.

In *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, the Supreme Court held that the provisions of section 3(4) as applied to the facts in that case meant "that Chicago-to-the-east railroads cannot lawfully charge more for carrying ex-barge than for carrying ex-lake or ex-rail grains to and from the same localities, unless the eastern haul of the ex-barge grain costs the eastern railroads more to haul than does ex-rail or ex-lake grain." Although on all-rail traffic the amount received by the East St. Louis-Danville lines is a division of the through charge, nevertheless it seems to me that the principle stated by the Supreme Court has application. The cause for complaint lies in the fact that these lines demand the rate of $2.95 per long ton applying from East St. Louis locally to Danville on traffic originating at New Gulf that may move from Galveston to East St. Louis by barge, although they receive a division, which it must be assumed is less than $2.95, of the joint all-rail rate on traffic for the same destination moving from New Gulf to East St. Louis by rail. Such a difference between the amounts received or demanded for the transportation beyond East St. Louis could have justification only if a substantial difference in the amount or character of the service beyond East St. Louis were shown. No such a showing has here been made. The evidence is to the contrary.

Section 3(4) of the act, among other things, prohibits carriers subject to part I of the act from discriminating "in their rates, fares and charges between connecting

lines," and the term "connecting lines" is therein defined as including common carriers by water subject to part III of the act. Complainants here are such common carriers. As stated in *Western Pac. R. Co. v. Southern Pac. Co.*, 55 I. C. C. 71, 81, "Wherever and whenever the discrimination is practiced as between carriers and connections in cases with respect to which the service is rendered under the same circumstances and conditions, unlawful results follow." The Commission there found, at page 73, that "The expression of rates and charges in the form of divisions makes them none the less rates and charges which may be discriminatory." That finding was a necessary preliminary to the conclusion therein reached that complainant was being discriminated against by defendants in the matter of divisions of joint rates, in violation of provisions of the act similar to those now in section 3(4). If divisions of joint rates were a "charge" under the law as it stood then, they must be a "charge" under the law as it stands today.

To my mind it is obvious that the complaining barge lines are being subjected to unlawful discrimination in and to the extent that the defendants operating from East St. Louis to Danville make a greater charge as compensation for their services when the transportation of this sulphur is by barge from Galveston to East St. Louis than they receive for such services when the transportation is by rail from New Gulf to East St. Louis.

In my separate expression in connection with the prior report herein, I dissented also from the finding there made, and here affirmed, that the establishment of a joint barge-rail rate on this traffic was not shown to be necessary or desirable in the public interest. I am now satisfied that such a finding would not be needed if the relief which I would accord under section 3(4) of the act were granted.

Commissioners Mahaffie and Alldredge authorize me to state that they join in this expression.

Commissioner Arpaia did not participate in the disposition of this proceeding.